LIEN HOE SAWMILL CO. SDN. BHD.

v.

YAP SING HOCK & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[CODE NO. D4-22-126-88]
29 FEBRUARY 1992

CIVIL PROCEDURE: *Mareva injunction - Material facts not disclosed at ex-parte stage - Whether all three ingredients to grant mareva injunction satisfied - Whether balance of convenience in favour of plaintiff.*

The defendants were the directors and shareholders of Yap Sing Hock Holdings Sdn. Bhd. (the holding company). Pursuant to an agreement dated 1 October 1984, the holding company was to purchase the entire issued capital of the plaintiff and two other companies. The holding company obtained banking facilities secured by debenture from Perwira Habib Bank (PHB) which were utilised to make payment of part of the purchase price of the plaintiff and two other companies. On 30 April 1985 the defendants were appointed directors and gained sole control of the plaintiff. On the same date they also obtained overdraft facilities of RM12 million from Hong Kong and Shanghai Banking Corporation (HSBC) in the name of the plaintiff. The RM12 million was transferred into the name of the holding company without proper documentation or security and RM6.3 million from the RM12 million was utilised as part of the purchase price of the plaintiff and the other two companies. Thereafter, transactions were done in favour of the 1st defendant without proper documentation or security to safeguard interest of the plaintiff. The holding company being in default of banking facilities granted by PHB, receivers and managers were appointed on 9 May 1986.

The first and second defendants have been charged with and are undergoing criminal trial in the Sessions Court in Johore Bahru.

Held:

[1] Even if the plaintiff had the evidence at the *ex parte* stage but did not disclose such evidence, the plaintiff was at liberty to introduce such evidence at the inter partes stage. In the present case all affidavits filed up to the date of the inter partes hearing were admissible and would be considered by the Court.

[2] The defendants do have an arguable defence but they do not have so much defence to convince the Court that the plaintiff's good arguable case cannot succeed. The plaintiff still has a good arguable case.

[3] What the plaintiff is required to do is to give same grounds for believing that the defendants have assets within jurisdiction. From the authorities cited and after considering the evidence the defendants have assets within jurisdiction.

[4] In view of the authorities cited and the evidence in the present case there is a risk of the assets being removed out of the jurisdiction or dissipated within jurisdiction.

[5] In the case of a mareva the Court does not consider whether damages would be an adequate remedy. The Court considers the balance of convenience by weighing all matters against the harm mareva injunction is likely to cause to the defendant. In the present case the continuance of the mareva injunction does not inflict hardship on the defendants.

[Defendants application dismissed with costs.]

Cases referred to:

Bank Bumiputra Malaysia Bhd. & Anor. v. Lorrain Osman & Ors. [1985] 2 MLJ ***(foll)***

Pac Asian Services Pte. Ltd. v. European Asian Bank AG [1989] 3 MLJ 385 ***(cit)***

Aspatra Sdn. Bhd. & 21 Ors. v. Bank Bumiputra Malaysia Bhd. & Anor. [1988] 1 MLJ ***(cit)***

Bank Mallet v. Nikpour [1985] PSR 87 ***(foll)***

Allen & Ors. v. Jambo Holdings Ltd. [1980] WLR 1252 ***(foll)***

Establishment Esefka International Anstalt v. Central Bank of Nigeria [1079] 1 Lloyd's Rep 445 ***(foll)***

Third Chandris Corp. v. Unimarine SA [1979] Im WB 645 ***(foll)***

Prince Abdul Rahman bin Turki v. Abu Taha [1980] 3 All ER 409 ***(foll)***

CBS United Kingdom Ltd. v. Lambert [1983] 1 Ch 37 ***(foll)***

Felixstave Dock and Railway Co. v. AS Lines 1 HC [1987] 2 Llyod's Rep 76 ***(cit)***

Rasu Maritima SA v. Perusahaan Pertanbangan Minyak Dan Gas Bumi Negara (Pertamina) and Government of Indonesia [1977] 3 All ER 324 ***(cit)***

Ninemia Maritime Corp. v. Trave Shiffahrtsgesellschaft mbh & Co. KG [1984] 1 All ER 398 ***(foll)***

Legislation referred to:

Companies Act 1965, s. 67(3)

For the plaintiff - D.P. Naban; M/s. Skrine & Co.

For the defendant - K.S. Narayanan; M/s. K.S. Narayanan & Associates

JUDGMENT

Zakaria Yatim J:

This is an application by the three defendants for the following:

(a) an order that the mareva injunction and ancillary orders obtained by the plaintiff *ex parte* on 4 July 1988 be dissolved;

(b) an enquiry be made whether the defendants have suffered damages by reason of the injunction which the plaintiff ought to pay according to their undertaking; and

(c) that the plaintiff pays the cost of the application and the said enquiry.

The *ex parte* order granted on 4 July 1988 *inter alia* states:

> Upon the application of Lien Hoe Sawmill Co. Sdn. Bhd., the plaintiff in this action and upon reading the summons in chambers dated 28 June 1988 and the affidavit of Ishak Hashim affirmed on 25 June 1988 both filed herein and upon hearing Mr. Palpanaban Devarajoo of Counsel for the plaintiff above named and the plaintiff by its Counsel undertaking to abide by any order the Court or a Judge may make as to damages in case the Court or a Judge shall hereafter be of opinion that the defendants shall have sustained any by reason of this order which the plaintiff ought to pay **It Is Ordered and Directed** that the defendants whether by themselves, their servants, or agents, or nominees, or otherwise howsoever be restrained, and an injunction is hereby granted restraining them from removing from the jurisdiction of this Court, selling disposing of, charging, pledging, transferring, or otherwise dealing with their assets and or assets held in the names of companies controlled by the defendants, from the jurisdiction (insofar as the same to not exceed the sum of RM30,000,000 (Ringgit Thirty million) including all monies, assets, shares and accounts held in the names of the defendants either severally or jointly, or in the names of their nominees or attempting to take any steps to remove the same out of the jurisdiction until the trial of this action or until further order **and it is further ordered** that each of the defendants disclose the value, nature and whereabouts of all their assets owned by them, whether beneficially or otherwise, whether in their own names, or in the names of their nominees, or in the names of the companies controlled or directed by any

one or more of them or otherwise howsoever, and that such disclosure be made by the defendants on oath by way of an affidavit to be filed in the Honourable Court within seven (7) days of service of this order on each of them.

At the commencement of the hearing of the application, Mr. K.S. Narayanan, Counsel for the defendant raised two preliminary points.

His first objection was that, when the plaintiff made the *ex parte* application before the Court, they failed to disclose what they alleged were the material facts. He said that the evidence was available to the plaintiff at the *ex parte* stage. He contended that the plaintiff should not be allowed to file further affidavits to introduce fresh evidence.

Mr. D.P. Naban, Counsel for the plaintiff denied that there was non-disclosure of material facts at the *ex parte* stage.

In my opinion even if the plaintiff had the evidence at the *ex parte* stage but did not disclose such evidence, the plaintiff was at liberty to introduce such evidence at the inter - partes stage. In *Bank Bumiputra Malaysia Bhd. & Anor. v. Lorrain Osman & Ors.* [1985] 2 MLJ 236, I said at p. 241:

> Even if the evidence was available at the time of the *ex - parte* application for *Mareva* injunctions or an Anton Piller Order but the evidence was not presented to the Judge then, in my opinion the plaintiff is not estopped from introducing such evidence during the *inter partes* proceedings.

Although the above passage is an *obiter*, the reasoning therein was adopted by the Singapore Court of Appeal in *Pac Asian Services Pte. Ltd. v. European Asian Bank AG.* [1989] 3 MLJ 385 @ p. 39. In *Aspatra Sdn. Bhd & 21 Ors. v. Bank Bumiputra Malaysia Bhd. & Anor.* [1988] 1 MLJ 97 @ p. 102, the Supreme Court said:

> We are of the view that in *ex-parte* or *inter partes* Mareva proceedings all relevant affidavits properly filed must be considered by the Court.

I ruled that in the present case all affidavits filed up to the date of the inter partes hearing were admissible and would be considered by the Court.

The second point was on the question of delay by the plaintiff in filing the *ex parte* application. I find no merit in that objection.

I shall now go into the application proper.

The facts relied upon by the plaintiff are as follows:

At the material time the defendants were the directors and shareholders of Yap Sing Hock Holdings Sdn. Bhd. (the holding company). The second and third defendants held shares in the holding company as the nominees of the first defendant. Pursuant to an agreement dated 1 October 1984 the holding company was to purchase the entire issued share capital of the plaintiff and two other companies, namely Tee Bros. Enterprises Sdn. Bhd. and Seng Aik & Co. Sdn. Bhd. The holding company obtained banking facilities from Perwira Habib Bank (PHB) which were utilised by the holding company to make payment of part of the purchase price of the plaintiff and two other companies aforementioned. These facilities were secured by a debenture created by and owes the holding company. On 30 April 1985 the defendants were appointed directors and gained sole control of the plaintiff. On the same date they obtained an overdraft facility of RM12 million from Hong Kong and Shanghai Banking Corp. (hereinafter referred to as "HSBC") in the name of the plaintiff on the security of fixed deposits with HSBC amounting to RM12 million which belonged to the plaintiff prior to its purchase by the holding company. Further on the same date, RM12 million was transferred from the said

overdraft facility of the plaintiff to an account with HSBC in the name of the holding company which had only been opened on that day. There was no proper documentation or security given in relation to this transaction.

Further on the same date part of the RM12 million was transferred from the plaintiff to the holding company namely RM6.3 million, was utilised by the holding company as part of the purchase price of the plaintiff and the other two companies. The holding company has not repaid the said RM12 million to the plaintiff.

Thereafter while the defendants were directors and in control of the plaintiff they caused the plaintiff to:

(i) purportedly sell and transfer certain shares to the first defendant, without any proper documentation, which the 1st. defendant has failed to pay.

(ii) make certain loans to the first defendant which were not properly or at all documentated or, secured and which have not been repaid.

(iii) discharge certain expenses on the 1st defendant's behalf which the 1st defendant has failed to reimburse the plaintiff.

(iv) sell a motor vehicle to the first defendant for which the first defendant has failed to pay.

These transactions were entered into without proper or any documentation or security to safeguard interest of the plaintiff.

The holding company being in default of the banking facilities granted by PHB, referred to above, receivers and managers were appointed on 9 May 1986 of the holding company under the debenture given in relation to such facilities, and entered into by the holding company.

In order to succeed in obtaining a Mareva injunction, the plaintiff has to satisfy the following three ingredients:

(1) the plaintiff must show that it has a good arguable case;

(2) the plaintiff must produce evidence that the defendants have assets within jurisdiction;

(3) that there is a risk of the assets being removed before the judgment is satisfied.

Mr. D.P. Naban, Counsel for the plaintiff submitted that the plaintiff had a good arguable case as well as a strong *prima facie* case. He argued that there was a breach of fiduciary duty as well as a breach of duty of care in the conduct and the management of the plaintiff.

Mr. Narayanan, Counsel for the defendants did not dispute that the plaintiff had a good arguable case but he said the defendants equally had a good arguable defence. On this ground, he said, a Mareva injunction cannot apply.

It is now necessary to examine the position in law regarding the point raised by Mr. Narayanan.

In *Bank Mallet v. Nikpour* [1985] FSR 87, Lord Denning MR in his judgment at p. 90, said:

> I would go further. It seems to me that although there might be an arguable case for the plaintiff bank on the merits, equally, on the material which has been put before us, there might be a good arguable defence. So much so that it is not a case in which a Mareva injunction should be granted.

In *Allen & Ors. v. Jambo Holdings Ltd.* [1980] 1 WLR 1252, Lord Denning MR. at p. 1255 also said:

> There are the two sides. It cannot be decided today. It has to be decided in the action. As the Judge says, it may be that the owners of the aircraft are wholly liable, or it may be that Mr. Allen was wholly liable; or it may be half and half. All that can be said is that the widow and her children have a good, arguable case for claiming damages on the ground that it was at least in part the fault of the pilot. That is sufficient. We said so in the *Rasu Maritima S.A.* case [1978] QB 644, 663 and, as we also said there, the Mareva principle applies not only to money but also to goods.

In *Establishment Esefka International Anstalt v. Central Bank of Nigeria* [1079] 1 Lloyd's Rep. 445, Lord Denning MR. said, at p. 448:

> I think I have said enough about the case to show that in regard to the claim there is a good arguable defence on account of the forged or fraudulent bills of lading to show that the claim is not well - founded. Alternatively there is an equitable set - off which more than over - tops the claim itself.
>
> That being the state of affairs, the practical question at the moment is whether or not there should be a Mareva injunction granted so as to prevent the central bank of Nigeria from removing out of the jurisdiction of England a very substantial sum of money to meet the plaintiffs' claim. I would not like to throw any doubt whatsoever upon the validity of the Mareva injunctions which have been granted since they were started year by year in the commercial Court and have proved to be of the greatest value, but in order that they should operate there should at least be a good arguable case for the plaintiffs that the money is going to become due to them. On the material before us, it seems to me that there are many doubts in the plaintiffs' claim and there is so much defence to be raised against it that it would not be a case where the plaintiffs have a really good arguable case to succeed. That is one ground on which it would not be right to grant a Mareva injunction.

From the above authorities, it appears that the defendant is entitled to argue that he has a good arguable defence. It is not any arguable defence. To quote Lord Denning in *Esefka International* case, the defendant must establish that "... There is so much defence to be raised ... that it would not be a case where the plaintiffs have a really good arguable case to succeed." I agree with Mr. Naban when he said in his written submission that in order to discharge a Mareva injunction a defendant must show such a defence which by its nature goes to the heart of the plaintiff's case such that the plaintiff can no longer be regarded as having a good arguable case.

I shall now examine the defence raised by the defendants in the present case.

It was the defence case that the present action is improper and misconceived as the present directors should not have been appointed and were wrongfully in control of the plaintiff. The appointment of the directors was made by the receivers and managers appointed under a debenture given by the holding company to Perwira Habib Bank in relation to the banking facilities granted to the holding company which were utilized towards the purchase of the shares of the plaintiff. The defendants contended that the said facilities and debenture were tainted by illegality as they contravened s. 67 of the Companies Act 1965.

I find that the defendants do have an arguable defence. But they do not have so much defence to convince the Court that the plaintiff's good arguable case cannot succeed. I am satisfied therefore that the plaintiff still has a good arguable case.

The next question to consider is whether the defendants have assets within the jurisdiction.

In the statement of claim the plaintiff averred that between 18 June 1985 and 22 October 1985 at various meetings of the board, it was resolved that the plaintiff sold certain shares in various public companies held and owned by the plaintiff at the aggregate value of RM10,144,190.

The first defendant on the basis of the said sales of shares took possession and control and converted the shares. The first defendant failed to make any payment pursuant to the sales of the shares and the plaintiff had not received any payment from the first defendant. According to Mr. Naban the first defendant had not denied that the said shares were transferred into his possession.

In his affidavit affirmed on behalf of Perwira Habib Bank on 25 June 1988, Encik Ishak Hashim said:

> The defendants, I verily believe, in view of *inter alia* all the aforementioned facts have substantial assets within the jurisdiction of this Honourable Court. I am informed that the 1st defendant despite the various actions for the recovery of moneys owed by him and judgment entered against him leads a luxurious life - style and has at his disposal various motor vehicles including a Rolls Royce.

The first defendant, in his affidavit affirmed on 10 July 1988, confirmed that he had the fleet of cars referred to in Ishak Hashim's affidavit. In his affidavit, the first defendant said, "In this context I wish to state that ... the cars that are at my disposal have been so available for many years and I do carry on and conduct some business ...

The first defendant did not dispute Encik Hashim's affidavit that the first defendant lead a "luxurious life - style".

It is not in dispute that the three defendants are citizens and residents of Malaysia.

Mr. Narayanan submitted that an application for a Mareva injunction must produce evidence which identifies specific assets which are present within jurisdiction.

In my opinion what the plaintiff is required to do is to give some grounds for believing that the defendants have assets within jurisdiction. In *Third Chandris Corp.* v. *Unimarine SA.* [1979] 1m WB 645, Lord Denning MR in his judgment at p. 668 said:

> The plaintiff should give some grounds for believing that the defendant has assets here ... In most cases the plaintiff will not know the extent of the assets. He will only have indications of them. The existence of a bank account in England is enough, whether it is an overdraft or not ...

In *Aspatra Sdn. Bhd.* v. *Bank Bumiputra Malaysia Bhd.* [1988] 1 MLJ 99, Mohd Azmi SCJ in delivering the judgment of the Supreme Court said at p. 24:

> In our view, this was an appropriate case to grant the mareva injunction ... BBMB and BMF had complied substantially with the guidelines laid down by Lord Denning at p. 984 of the Third Chandris Shipping case (ante) and we are satisfied that Zakaria Yatim J had exercised his discretion on correct principles ...

From the authorities cited above and after considering the evidence in the present case, I am satisfied that the defendants have assets within the jurisdiction.

The other question is whether there is a risk of the assets being removed before judgment is satisfied.

Mr. Naban submitted that in order to determine whether there is any risk of the defendants removing their assets outside jurisdiction or dissipating their assets within jurisdiction, the following facts may be considered:

On 30 April 1985 the defendants were appointed directors and gained sole control of the plaintiff.

On the same day an overdraft facility of RM12 million with HSBC was obtained in the name of the plaintiff.

The said overdraft facility was secured on fixed deposit of RM12 million with HSBC which belonged to the plaintiff prior to its purchase by the holding company.

On the same day the RM12 million was transferred from the said overdraft facility of the plaintiff to an account with HSBC in the name of the holding company which had only been opened that day.

On the same day RM6.3 million of the RM12 million transferred to the account in the name of the holding company was used towards part of the purchase price of shares in the plaintiff.

These transactions were not properly documentated.

Holding company has not repaid or returned any part of the said RM12 million to the plaintiff.

The first and second defendants have been charged with and are undergoing trial in the Sessions Court in Johore Bahru in relation to the following offences:

(a) that the first and second defendants misappropriated RM12 million worth of properties entrusted to them as directors of the plaintiff herein on 30 April 1985;

(b) that the first and second defendants misappropriated RM2,500,571 worth of properties in Johore Bahru on 10 May 1985 in their capacities as directors of the holding company.

(c) that the first and second defendants as officers of the plaintiff herein gave financial assistance to the holding company to buy 4,413,284 shares in the plaintiff, and thereby committed an offence under s. 67(3) of the Companies Act 1965;

(d) that the first defendant dishonestly induced HSBC, by deceiving to Johore Bahru branch manager to deliver RM12 million to the 1st defendant in a temporary overdraft as working capital for the plaintiff.

The plaintiff has given some grounds for believing that there is a risk of the assets being removed before judgment. See *Third Chandris* case *supra*. at p. 669.

In *Prince Abdul Rahman bin Turki* v. *Abu Taha* [1980] 3 All ER 409, Lord Denning MR said:

> So these two young men, on their own statements, have accumulated great wealth during their short time in business. But neither of them gives his home address, as under the rule each ought to have done. Why not? It leads me to think that they are not at all trustworthy. Their houses may be in the names of nominees so as to prevent creditors getting their hands on them. At any rate, the circumstances suggest to my mind that there is a risk that, if the plaintiff should get judgment, he may find that before he can issue execution, the defendants may have disposed of their assets. They may have taken them out of the jurisdiction or transferred them to someone here.

In *CBS United Kingdom Ltd. v. Lambert* [1983] 1 Ch 37, Lawton LJ in his judgment said:

> They also told the solicitors that the first defendant had recently bought a Lotus Esprit motor car, registration number OPW 656W at a cost of £9,000 and a Jaguar motor car of the XJ6 type which had a T registration letter. They also said that they believed him to be the owner of two Jensen Healey motor cars and Scimitar car. Further, he had rented accommodation at 44A, Chingford Mount Lane, London, E.4, which he had shared with a woman who was thought to be his mistress. From what the plaintiffs had learned and had been told (and I have summarised the evidence very briefly) they drew the following inferences: first, that from at least November 1981 the first defendant, helped by his wife, had been engaged in a large way with the production,

> distribution and sale of counterfeit cassettes; secondly, that the size of his alleged operation, as assessed from the number of labels found and the titles on his order forms, was consistent with the production and sale of about 35,000 counterfeit cassettes which, if proved at a trial, would entitle the plaintiffs to damages in conversion of about £105,000; thirdly, that the first defendant was pretending to be unemployed when he was not and to be receiving social security payments when he had no right to them; fourthly, that he was spending money on assets such as expensive motor cars, which could easily be hidden from creditors and disposed of for cash if the need arose; and, finally, that he intended to do all he could to ensure that, if his illegal activities in the production of counterfeit cassettes was discovered, the owners of the copyrights would be unable to enforce any judgment they obtained against him or his wife. In our judgment, these inferences were justified. On the facts put before us this was not a case of a plaintiff seeking judgment. It was one which seemed to us to show that the first defendant was conducting his affairs with intent to deprive anyone who got judgment against him of the fruits of victory. The Mareva injunction was brought into use to make this kind of behaviour in commercial cases unprofitable.

In view of the authorities cited above and the evidence in the present case I am satisfied that there is a risk of the assets being removed out of jurisdiction or dissipated within jurisdiction.

Having considered the three ingredients, it is necessary to consider the balance of convenience in this case. It is said that the balance of convenience is an important factor in applications for Mareva. The Court's approach, however is different from that of ordinary interlocutory injunction. In the case of a Mareva the Court does not consider whether damages would be an adequate remedy. The Court considers the balance of convenience by weighing all matters against the harm Mareva injunction is likely to cause to the defendant. See David Capper, Mareva Injunctions 1988 p. 50. The question of balance of convenience was considered in *Felixstowe Dock And Railway Co.* v *US. Lines Inc.* [1987] 2 Lloyd's Report 76, and in *Rasu Maritima SA* v. *Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina) and Government of Indonesia* [1977] 3 All ER 324. *In Ninemia Maritime Corp.* v *Trave Schiffahrts - gesellschaft MBH & Co KG.* [1984] 1 All ER 398, Mustill J, as he then was, in his judgment at p. 422 said:

> ... The ultimate test for the exercise of the jurisdiction is whether in all the circumstances, the case is one in which it appears to the Court 'to be just and convenient' to grant the injunction ... Further, it must always be remembered that if, or to the extent that, the Mareva injunction inflicts hardship on the defendant, his legitimate interests must prevail over those of the plaintiff ...

I have considered the evidence in the present case and I am satisfied that the continuance of the Mareva injunction does not inflict hardship on the defendant. In his affidavit affirmed on July 1988, the first defendant said that he was not a bankrupt, his fleet of cars were still at his disposal and he still carried on and conducted his business. The other defendants had not shown that the Mareva injunction had inflicted hardship on them.

Assuming that after the continuance of the Mareva injunction they suffer great hardship as a result of the injunction, they are at liberty to apply to this Court to vary the Mareva injunction to alleviate the hardship.

For the reasons stated above, I dismiss the application with costs.

Also found at [1992] 2 CLJ 1022